TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Constitutional Provisions Involved 3

Statement of Case 3

(A) A Great Mass of Irrelevant, Hearsay and Prejudicial "Evidence" Was Introduced 11

(B) Police Accusations of and Petitioner's Exculpatory Statements to, Police Officers Were Permitted in Evidence 12

(C) The Trial Court Sanctioned Protracted Argument by the Prosecutor That Defendant Had Not Taken the Stand 13

(D) Testimony of Wire Tapping Was Introduced in Evidence 13

Reasons Relied on For Allowance of the Writ 14

I. The Doctrine of Waiver or Res Judicata Cannot Be Applicable Here 14

II. The Testimony Coerced by the Prosecutor Constitutes Deprivation of Due Process 15

III. The Community Was So Infested With Prejudice As to Make a Fair Trial Impossible 17

IV. The Totality of Departures from Accepted Procedures Denied Petitioner a Fair Trial 19

V. The Indictment Was Totally Defective in That It Charged a Conspiracy to Murder Which Is Not a Crime in Ohio—and Therefore Lacked the Requisite Specificity Required Under the United States Constitution 22

Conclusion 23

Appendix A. Opinion of the Court of Appeals, Lucas County, Ohio ---- 24

Appendix B. Judgment of the Supreme Court of the State of Ohio ---- 39

Appendix C. Appendix of Newspaper Headlines ---- 40

Appendix D. Indictment ---- 43

Appendix E. Statutes and Constitutional Provisions Involved ---- 46

TABLE OF AUTHORITIES.

Cases.

Anderson v. Maxwell, Warden, 10 Ohio State 2d 188 (1967) ---- 14

Ashcraft v. Tennessee, 322 U. S. 143 (1944) ---- 16

Bram v. United States, 168 U. S. 532 (1897) ---- 20

Brown v. Mississippi, 297 U. S. 278 (1936) ---- 15

Canty v. Alabama, 309 U. S. 629 (1940) ---- 16

Chambers v. Florida, 309 U. S. 227 (1940) ---- 15, 19

DeBrul v. State, 80 O. S. 52 ---- 23

Delaney v. United States, 199 F. 2d 107 (1952) (C. A. 1) ---- 18

Estes v. Texas, 381 U. S. 532 (1965) ---- 18

Fay v. Noia, 372 U. S. 391 (1963) ---- 14, 15

Fontana v. United States, 262 Fed. 283 (1919) ---- 23

Forman v. United States, 259 F. 2d 128 (1958) ---- 19

Freeman v. Maxwell, Warden (1965), 4 Ohio State 2d 210 ---- 14

Greenland v. State, 6 O. Dec. 313, 4 O. N. P. 122 ---- 23

Griffin v. California, 380 U. S. 609 21
Grunewald v. United States, 353 U. S. 391 (1957) 19
Haynes v. Washington, 373 U. S. 503 (1963) 21
Irvin v. Dowd, 336 U. S. 717 (1948) 18
Johnson v. New Jersey, 384 U. S. 719 (1966) 20
Jones v. State, 211 Ala. App. 505, 109 So. 564 17
Leyra v. Denno, 347 U. S. 556 (1954) 16
Mallory v. United States, 354 U. S. 449 (1957) 16
McMullen v. Maxwell, Warden, 3 O. S. 2d 160 (1965) 15
McNabb v. United States, 318 U. S. 332 (1943) 16
Miranda v. Arizona, 384 U. S. 136 (1966) 16, 20, 21
Mitchell v. State, 42 O. S. 383 22
Mooney v. Hollohan, 294 U. S. 103 (1935) 15
Moore v. Dempsey, 261 U. S. 86 (1923) 16, 17
Nye and Nissen v. United States, 336 U. S. 613, 93 L. Ed. 919 (1948) 22
Pyle v. Kansas, 317 U. S. 213 (1942) 15
Sheppard v. Maxwell, 384 U. S. 333 (1966) 19, 20
State v. Hallos, 76 O. A. 521, 32 O. O. 245 22
State v. Lucas (C. P.), 54 O. L. A. 212, 39 O. O. 519 22
State v. Perry, 10 Ohio State 2d 175 .....5, 6, 14, 15
State v. Snell, 2 O. N. P. 55, 5 O. D. 670 (Common Pleas, 1898) 22
State v. Whitmore, 126 O. S. 381 23
United States ex rel. Almida v. Baldi, 195 F. 2d 815 (1952) 15
United States v. Consolidated Laundry, 291 F. 2d 563 (1961) 15

United States v. Hess, 124 U. S. 483 (1888) 23
United States v. Soblen, 203 F. Supp. 542 (1961) .. 15
United States v. Wortman, 327 F. 2d 717 (1964) .. 19
Vernon v. Alabama, 313 U. S. 547 (1941) 16
Ward v. Texas, 316 U. S. 547 (1942) 16

Constitution and Statutes.

Constitution of the United States:
Amendment V 3, 46
Amendment VI 3, 46
Amendment XIV 3, 18, 46
Ohio Revised Code:
Sec. 1.17 (G. C. 12380) 3, 22, 47
Sec. 2801.01 (G. C. 12400) 3, 46
Sec. 2953.21 ..... 3, 14, 47
28 U. S. C. 1257(3) 2

Other.

Douglas, The Public Trial and The Free Press, 33 Rocky Mt. L. Rev. 1 (1960) 18
39 N. Y. U. L. R., 78 (1964) Federal Habeas Corpus for State Prisoners: The Isolation Principle 15
40 N. Y. U. L. R., 154 (1965) State postconviction remedies and Federal Habeas Corpus 15

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

THOMAS LICAVOLI,
Petitioner,

against

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on April 26, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals of Lucas County entered on April 20, 1935 affirming Petitioner's conviction is reported at 20 Ohio Op. 562, and printed in Appendix A to this Petition, *infra*. The Supreme Court of Ohio did not render any formal opinion in dismissing Petitioner's belated appeal in 1965; nor did The Common Pleas Court, the Lucas County Court of Appeals or the Ohio Supreme Court in denying or dismissing Petitioner's request for post conviction relief and the appeals therefrom.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on the 26th day of April, 1967, Appendix B, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3) since rights, privileges and immunities under the United States constitution are claimed to have been violated.

QUESTIONS PRESENTED.

(1) May a State Court in a post conviction remedy brought by a convicted defendant who was represented by counsel in his original trial, find that constitutional issues which were, or could have been fully litigated either before conviction or on direct appeal are barred by waiver or the doctrine of *res judicata*, without regard to whether there was a knowing or understanding waiver of such issues.

(2) Is there a due process violation when a prosecutor secures a criminal conviction by testimony he systematically obtains by coercion of witnesses both *prior to the trial* by threats and beatings, and *during the trial* by causing the arrest of witnesses without warrant on perjury charges, effectively causing them to change their previously given testimony in the ongoing trial.

(3) Does a murder conviction offend due process when at the time of trial a fever pitch had been built up in the community, which assigned culpability to the accused for numerous *other* murders—including a murder on the eve of the trial in respect to which the claim that accused was responsible therefor was given wide newspaper publicity, immediately prior to and during the course of the trial.

(4) When a court permits a trial to be conducted in a carnival atmosphere, permits the introduction into evidence of an overwhelming mass of highly inflammatory, prejudicial and irrelevant testimony, permits the conduct of the prosecutors case on the theory that a defendant is guilty of murders charged for the reason that there were "no such murders before defendant came to town," and permits other gross departures from orderly and accepted procedures required for fair trial, does the totality of the circumstances require reversal as a violation of the constitutional requirement of fair trial.

(5) When the criminal law of a state does not interdict criminal conspiracy, is an indictment charging that a defendant with others conspired to kill and killed, so lacking in specificity as to violate the constitutional requirement that a defendant must be fairly apprised of the nature and character of the charge against him.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent Constitutional provisions (United States Constitution Amendments V, VI and XIV) and the pertinent statutes (Ohio R. C. 2801.01, 1.17, and 2953.21) are reproduced in Appendix E, *infra*, pp. 46-47.

STATEMENT OF CASE.

The four count indictment returned against Petitioner, Thomas Licavoli, charged him along with twelve others of conspiring to kill two persons and killing each of them (2 counts), and in the other two counts of killing two other persons in the effort to kill the persons named in the other two counts.

Petitioner was convicted on the 9th day of November 1934 of first degree murder on all four counts, with a recommendation of mercy, and a life sentence imposed.

Petitioner contended that he had nothing to do with any of the killings. There was no evidence adduced to show, nor did the State claim, that Petitioner was one of the killers. The theory of the State's evidence was that Petitioner led a band of outlaws, certain of whom killed the decedents, and therefore Petitioner must have directed the crimes, or participated in some complicitous manner therein.

At the time of sentencing, the Court stated that a conviction without recommendation of mercy would have been amply justified by the evidence. A prompt appeal was made to and denied by the Lucas County Court of Appeals. No further appeal was taken until 1965, when Petitioner, pursuant to motion appealed to the Ohio Supreme Court to permit a belated appeal. The Motion was denied and the appeal dismissed, *sua sponte,* by the court, ruling no debatable constitutional issue was presented.

Petitioner then filed his petition with the Common Pleas Court of Lucas County (under Ohio Rev. Code 2953.21), which denied the claim of Petitioner (raised both by his Petition and in the hearing held thereon) that his constitutional rights had been infringed by virtue of the contentions set forth in Sections Two, *et seq., infra;* and that, therefore, his conviction should be reversed. Indeed, these questions were also raised in the 1965 belated appeal to the Ohio Supreme Court.

Timely appeal was denied by the Court of Appeals of Lucas County, Ohio, Sixth Appellate District, on December 13, 1966. Motion for leave to appeal was denied, and the appeal as of right by Petitioner to the Ohio Supreme

Court was dismissed *sua sponte* "for want of a debatable constitutional question" on April 26, 1967, from which ruling certiorari is here sought.*

I.

During the course of Petitioner's counsel's argument to the Ohio Supreme Court,** the Chief Justice inquired whether Petitioner had counsel in his 1934 trial, and when the answer to that question was in the affirmative, whether the questions raised by the post conviction proceeding had been raised in the original proceeding, or were known and available to be raised at that time. When counsel answered that it appeared that all fell into one category or the other, Mr. Chief Justice Taft stated that all Petitioner's rights were barred by *res judicata* or by waiver; that the Supreme Court of Ohio was not required by the post conviction constitutional remedy to hear claims which were or could have been raised on appeal.

On May 3, 1967, the Supreme Court of Ohio enunciated this doctrine in *State v. Perry*, 10 Ohio State 2d, 175, at 176, headnote 7:

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* The evidence adduced in the Common Pleas Court under the Post Conviction Constitutional Remedy is: (1) testimony contained in the Bill of Exceptions i.e. offered orally or stipulated at the time of hearing, hereafter "R," (2) the transcript of the original 1934 trial which was admitted into evidence as Exhibit A hereafter "A," and (3) a series of newspaper articles which were all admitted into evidence as Exhibit B hereafter "B," together with a date. The newspaper articles appear in Exhibit B by date *seriatim*. (Ex. B headlines are reproduced as App. C, *infra*.)

** Under Ohio procedure, every appeal to the Supreme Court of Ohio is deemed to be (1) a motion to certify; and (2) if constitutional issues are raised the appeal is of right; however, the Supreme Court of Ohio (*sua sponte*) takes every "appeal of right" as though under a motion to dismiss on the ground that no substantial constitutional question exists. Oral argument is allowed on the motions thus presented before the court.

"Constitutional issues cannot be considered in post-conviction proceedings under Section 2953.21 et seq., Revised Code, where they have already been or could have been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him."

Although the decision in the *Perry* case had not been announced at the time of argument of Petitioners' cause before the Ohio Supreme Court, *Perry* had already been argued, and quite probably a decision reached by the Court.

When counsel for Petitioner concluded argument, Chief Justice Taft informed opposing counsel that he need not argue since the court was satisfied that the court should dismiss *sua sponte*.

II.

No direct evidence was adduced to implicate Petitioner in the killings; therefore, the evidence associating Petitioner to various illegal enterprises or certain persons was critical to the State's case. The manner in which such testimony was obtained involves the testimony of several witnesses.

(A) Ed Beck was called to testify that when he was working at an illegal still he had gone to Petitioner's Argonne Hotel suite for pay (A 383). When called by the State, Beck declined to so testify, and denied that he had so informed the Prosecutor. At the conclusion of his testimony, the court was requested by the prosecution to order Beck to remain *about the courthouse* (A 389-390). *The Court did so. On orders of the Prosecutor (and without any apparent order of the court), Beck was then arrested. It is stipulated* (R. 15) *that Beck was then incarcerated in the Lucas County jail, discharged to the Prosecutor on*

October 27; and on October 29, he recanted and testified in a manner "satisfactory to the prosecutor" (A 537, et seq.). *His arrest was reported in the newspapers* (B Oct. 25), *where the headline in the Toledo Blade read "Licavoli Witness Jailed for Perjury."*

(B) Similarly coerced into testifying in a manner satisfactory to the Prosecutor was John H. Brown, who had been Petitioner's gardener. Prior to his being called, there was evidence that an automobile utilized in one of the murders bore a "fictitious" license plate. The prosecutor sought testimony from Brown that prior to that murder he saw several of the alleged conspirators in the Petitioner's garage cutting up license plates. Brown, when he first took the stand, would not so testify (A 1275 et seq.).* Immediately *following his testimony he was also arrested and incarcerated on the Prosecutor's orders, again without any order of the Court* (R. 16), *and later taken to Prosecutor Ream's office.* He was then recalled and gave testimony in conformity with the Prosecutor's desire (A 1363-1366).

Brown's perjury arrest was reported (B Nov. 3) in the Toledo Blade, which article noted that Beck had given satisfactory testimony after his similar arrest. The current Prosecutor of Lucas County (an assistant in 1934) testified at the Post Conviction Remedy hearing that the arrests of Beck and Brown on Prosecutor's order without warrant were unusual.

(C) The Prosecutor caused to be imported from Detroit the "Clark Brothers," who were *specially trained third degree intimidators who tortured witnesses until they agreed to give "satisfactory" testimony.*

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* Brown did testify when asked if he had not so informed the Prosecutor, that he had been coerced in his original statements to the Prosecutor (A 1285 et seq.) and that he had said things that were not true (A 1296, 1297, 1298). Not only Brown had been threatened but his wife (A 1287, 1288).

Sam Stein testified that a gun (identified by other testimony as the murder weapon in one of the killings) had been purchased from him by one Jake Sulkin, an alleged lieutenant of petitioner. Stein testified (A 1147, et seq.) that he had told several different stories about the gun. *When he had refused to testify as the Prosecutor wished, he was indicted for murder and held without bail, then was closeted on a weekend in the Prosecutor's office with the Clark Brothers, who beat him unmercifully! During the course of the beatings, Mr. Frazier Reams, the Prosecutor, came in, and one of his Assistants from time to time, "looked in."* (A 1157-1176.) *When Mr. Stein, crazy and terrified by pain and torture, agreed to name Jake Sulkin as the purchaser of the gun, the beatings ceased.* After that, a deposition was taken and his murder indictment dropped. He was, of course, from that time on patently subject to a charge of prejury should he fail to testify as deposed.*

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* Overreaching is also suggested in the obtaining of testimony of others, e.g. (1) Ernest Reid (A 594 et seq.), had been scared and was afraid of being charged criminally (A 605, 606), was questioned over a period of eight hours (A 601, 602), the Clark Brothers "helped him" make identifications (A 603), had called him yellow, swore at him, and *threatened him with jailing.* (2) Harry Craig (A 1210 et seq.) and Robert Schwaite (A 1246 et seq.), had viewed in a lineup the men claimed to have shot victim Kennedy, but did not at that time identify the alleged killers (A 1237 Craig, 1268, Schwaite). Both saw the Clark Brothers numerous times (A 1226). Both were given $5.00 (A 1241) when they identified the "killers" pictures (A 1227, A 1267). *They were scared and uncomfortable with the Clark Brothers* (A 1240-1271). At the end of the English trial—one of the alleged conspirators—they received a witness fee of $34.00 and an additional $25.00 (A 1262). They were expecting further money out of this trial (A 1242). The Prosecutor also got Schwaite a job; he had been on relief (A 1269). (3) After the English Trial, Helen Buder (A 1343, et seq.) was taken by a policeman without request on her part (A 1348) to the Prosecutor's office. With the help of the Clark Brothers, she at that time identified English as the killer in one of the murders. Prior thereto she had denied recognizing anyone.

III.

At the hearing on the post conviction remedy, counsel for Petitioner contended that the evidence showed that there was a fever pitch in the community incited by prejudicial publicity. *The Prosecutor admitted that there was a fever pitch in the community but contended* (R. 80), *"there was a 'fever pitch' brought upon in this community not by the trial, nor by the newspaper publicity, but by the history and experience of it by the witnesses of this community. From the time this Defendant and gang came to the community that is when 'fever pitch' started to be brought upon over the course of years by numerous, numerous murders * * *."*

However created there is thus no question but that the community was at a fever heat straining for a conviction of the reputed gangland king to whom culpability for "numerous numerous murders" had already been assigned.

The newspaper articles introduced* demonstrate the overwhelming guilt already ascribed to Petitioner by the community. He is pictured as the head of a murderous gang, bent on murderously erasing from this vale anyone who stands in his way.

The coverage given to Petitioner's trial was in itself prejudicial, but the story did not end there.

Worthy of particular attention are:

(1) *the headline stories on October 4 and October 5, 1934 (within a week of the time Petitioner went to trial) blaming the Petitioner for the October 3 murder of one Jimmy Hayes,***

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* The headlines and dates are set out in Appendix C, pp. 40-42, *infra.*

** See also the other articles on the Hayes matter: "Hayes Climbs From Cabbie to Dice King," "Broker Last to See Hayes"

(2) the stories which relate to the perjury arrests on October 25, of Beck, and of Brown, November 2 and 3,

(3) the characterization of the murders by the newspaper articles as gang killings; i.e., those of the "Petitioner's gang"; and the characterization of the Petitioner throughout as a gang boss,

(4) newspaper reports of alleged efforts at jury tampering, B Oct. 27 (App. C, *infra*), and

(5) the carnival atmosphere in the courtroom which reached its peak when Prosecutor Rhinefort attacked Sheriff David Krueger physically *in the courtroom* following the Sheriff's testimony that neither prosecution witness Craig nor Schwaite had identified the men they had named as the killers in the ongoing trial, when they viewed them in a lineup. (B Nov. 5, 1934).

IV.

In addition to the massive prejudice created by the overreaching conduct of the prosecution in the obtaining of testimony, and the aura of prejudice against Petitioner which poisoned the community mind, as individual deprivations of due process, the totality of the conduct of the trial fell far short of that minimum requirement demanded by due process. In addition to the matters heretofore covered:

(Continued from preceding page)

(R. 23), "Jimmy Hayes, Fifteenth Gang Death Victim" (R. 24). Another article headlined "Hayes Not Before Grand Jury Here," *speculated as to whether Hayes was going to be a trial witness against Licavoli* (R. 24). On October 30, during the midst of trial, "Charities to Benefit by Jimmy Hayes Will" (R. 24).

(A) A Great Mass of Irrelevant, Hearsay and Prejudicial "Evidence" Was Introduced.

(1) An overwhelming mass of irrelevant, hearsay and prejudicial testimony was introduced that various of the alleged conspirators were known to each other, or to various witnesses, were known to know persons, and to frequent business establishments known to and frequented by others of the alleged conspirators." The result was that hundreds of pages of the record is devoted to witnesses "identifying" the defendants as having been seen in a particular place, or in the company of one of the defendants.* Virtually without exception the place was a public one, and no one on such occasions was engaged in any impropriety.

(2) Testimony was repeatedly offered *that certain of the alleged conspirators had been arrested time and again.*** On at least a half dozen occasions, the purport of the question was "when did you meet the Petitioner (or one of the alleged co-conspirators)?" and the answer was, "I met him when I arrested him."

(3) One witness even was permitted, over objection, to testify (Edith Marks, (A 1122)), that her husband was murdered!—and that some time thereafter Petitioner had taken over the murdered man's night club. The obvious inference was that Petitioner was involved in yet

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* Examples are found in the testimony of Millie Thompson (A 162); Fatotles (A 189); Petcoff (A 210); Ingabosbe (A 224); Matony (A 226); Irwin (A 230); Brenon (A 249); Thorpe (A 273); Holderman (A 286); Marea (A 324); Eckerman (A 390); McBride (A 397); Green (A 404); Sheets (A 410); Ford (A 505); McCarthy (A 563).

** Examples of this are found at A 251-254, 406, 411, 417, 418, 437, 439, again 439, 440, again 440, 443, 444, 448, 452, 486, 485, 486, 488 and 506 (Petitioner in Federal Court on a bootlegging charge on which he was ordered acquitted by the Court of Appeals), 515, 517, 518, 521, 566 and 682.

another murder. Yet it would have sufficed for her merely to testify that her husband was dead, as indeed she had already. But the prosecutor persisted (over objection) to ask whether her husband died a natural death.

(4) A policeman was permitted to testify that when he left to go out to the Golden Rose, a night club allegedly operated by Petitioner, he took with him what he thought was a loaded gun. When he returned home later, he found that the gun was in fact unloaded.*

(5) The mother of victim Kennedy (A 527) testified the alleged killer came to her with her son and swore he meant no harm to her son; but that she didn't believe him and told him so (A 530); *that her son had characterized the defendants as being a bad bunch of people who were no good for Toledo* (A 533).

(B) Police Accusations of and Petitioner's Exculpatory Statements to, Police Officers Were Permitted in Evidence.

Police officers testified over objection that they spoke to Petitioner and accused him of being responsible for the killings, *for the reason that this sort of killing had not taken place before Petitioner moved to Toledo;* although Petitioner had denied the accusations. (861 et seq.)**

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* The inference that someone had placed his life in danger by surreptitiously unloading the gun was intended and inescapable.

** "Q. Do you recall any other conversation that you had with him (Licavoli) regarding any of these other men whose pictures you have observed here?

A. Objection: Overruled (Exception).

(Continued on following page)

(C) The Trial Court Sanctioned Protracted Argument by the Prosecutor That Defendant Had Not Taken the Stand.*

(D) Testimony of Wire Tapping Was Introduced in Evidence.

The testimony was of telephone conversations involving defense matters (A 489-515) (B Oct 26—see App. C, *infra*).

V.

The indictment is annexed hereto as App. D. Each count of the indictment in effect charges a conspiracy to murder. While murder is of course a crime in Ohio, there is no crime of conspiracy.

(Continued from preceding page)

A. Only that I told him he had made the biggest mistake of his life by bringing these fellows in here, that he promised me when he first came here he was only going to make this his home.

By Mr. Schreiber: Move to strike out the answer.
Court: Overruled; Exception.

Q. Go ahead with your answer (Obj. ov. Ex.)
A. And I said since he has brought that gang in here there has been a lot of killings and he is not going to get away with it.

(Motion by defendant to strike out answer, overruled, ex.)

Q. And what did he say to that? (Obj. Overruled, Ex.)
A. He said he didn't have anything to do with any killings, and I told him at that time we didn't have any gang killings until he came to this town.

Mr. Schreiber: We make the same objection * * *."

* R. 1421, 1433, 1452, 1453, 1520, 1521, 1521.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Doctrine of Waiver or Res Judicata Cannot Be Applicable Here.

Until enactment of O. R. C. 2953.21 post conviction review of constitutional rights in Ohio was possible only in a state habeas corpus proceeding commonly instituted in the Ohio Supreme Court. The post conviction remedy was enacted to require testing constitutional rights initially in the original trial court.

In *Freeman v. Maxwell Warden* (1965), 4 Ohio State 2d 210, the Supreme Court of Ohio held such remedy replaced habeas corpus, and *sua sponte* since has dismissed habeas proceedings brought to test infringement of federally guaranteed constitutional rights. See also *Anderson v. Maxwell Warden,* 10 Ohio State 2d 188 (1967).

The doctrine erected by *Perry,* 10 Ohio St. 2d 175, is that in determining federal constitutional rights the state may ignore the requirements laid down in *Fay v. Noia,* 372 U. S. 391 (1963) at 438. The court, in *Noia,* laid down a broad rule that unless there is an understanding and knowing waiver, federal constitutional rights are not waived. As in *Noia,* Petitioner's was "the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal, which if successful might have led to a retrial and death sentence * * *." Here, as in *Noia,* the language of the Judge in sentencing made the risk that Licavoli "if reconvicted would be sentenced to death palpable and unusually acute." 372 U. S. at 440. Thus, *Noia* requires a ruling that petitioner did not waive his constitutional rights by not pursuing his appeals in 1935.

The vice of *Perry,* as applied here, goes beyond examination of simple *waiver—res judicata* considerations.

Perry implicitly voids *Noia's* requirement of an examination whether waiver has factually occurred; and instead lays down a rigid doctrinaire rule.* In applying federal constitutional rights (and in considering the questions of *waiver—res judicata* arising thereunder), a state court must be required to apply applicable principles laid down by this Court. As an outgrowth of the supremacy principle, a state court cannot be permitted to set a more corrosive standard extinguishing a federal constitutional right.**

II. The Testimony Coerced by the Prosecutor Constitutes Deprivation of Due Process.

It is axiomatic that the prosecutor owes a far greater duty to the community than merely obtaining of a conviction. He is required to cause a fair and proper picture of the evidence to be placed before the jury. The prosecutor may not knowingly employ false testimony,*** nor may he suppress or conceal from the defense evidence which might tend to acquit the accused.† Nor may he use coerced confessions.‡

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* See 40 N. Y. U. L. R., 154 (1965) State postconviction remedies and Federal Habeas Corpus; 39 N. Y. U. L. R., 78 (1964) Federal Habeas Corpus for State Prisoners: The Isolation Principle.

** Since *Noia,* many courts and writers have been "troubled" by the increase in federal habeas proceedings brought by state prisoners. An adaption of the rule urged here would require state courts to apply "federal" principles to federal issues, and a concomitant reduction of the necessity of relief in federal courts.

*** *Pyle v. Kansas,* 317 U. S. 213 (1942); and *Mooney v. Hollohan,* 294 U. S. 103 (1935).

† *United States v. Consolidated Laundry,* 291 F. 2d 563 (1961); *United States v. Soblen,* 203 F. Supp. 542 (1961); *United States ex rel. Almida v. Baldi,* 195 F. 2d 815 (1952); *McMullen v. Maxwell, Warden,* 3 O. S. 2d 160 (1965).

‡ *Mooney v. Hollohan, supra; Brown v. Mississippi,* 297 U. S. 278 (1936); *Chambers v. Florida,* 309 U. S. 227 (1940);

Equally offensive is the testimony of a witness under compulsion, or coercion—one who is compelled to testify while in fear of retaliation, criminal prosecution, or physical injury to his loved ones, or himself. In such instance we have not a trial but an inquisition, *Moore v. Dempsey*, 261 U. S. 86 (1923), especially when the coercion is initiated by the Prosecutor, and is given tacit approval by the Court.

It defies reality to contend—when witnesses were indicted for murder, beaten, abused, tortured and threatened by the prosecutor, arrested for perjury after their testimony and released only when they agree to testify in the manner demanded by the prosecutor—that there was here a trial conducted within the limits of the requirements of the Due Process Clause. *Cf. McNabb v. United States*, 318 U. S. 332 (1943); *Mallory v. United States*, 354 U. S. 449 (1957). Testimony coerced from a witness is even more suspect and unreliable than from a defendant. A defendant has great motivation to resist coercion; and should he succumb, when he takes the stand, he is under the strongest motivation to renounce a false confession. A witness resists coercion only by dint of the highest morality; and once he succumbs (to give a statement) is under strong motivation not to recant for fear of criminal action against him.

Perhaps a different posture obtains when the coercion ends prior to trial. Then when the witness testifies, he can be assured by the court that he need only tell the truth, and the jury can determine where the truth lies. But when, as here, the coercion continues right through

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(Continued from preceding page)

Canty v. Alabama, 309 U. S. 629 (1940); *Vernon v. Alabama*, 313 U. S. 547 (1941); *Ward v. Texas*, 316 U. S. 547 (1942); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Leyra v. Denno*, 347 U. S. 556 (1954); *Miranda v. Arizona*, 384 U. S. 136 (1966).

the testimony at the trial, when compusion techniques—i.e., the perjury arrests in the midst of trial—*continue while the testimony is taken, due process is clearly violated, Moore v. Dempsey, supra.*

The vice is accentuated by the court's order to the witness to remain about the courthouse until he could be arrested, and coerced into changing his testimony. Even if the court did not initially know the purpose for which the request was made, he certainly learned it! It then became his plain duty to take ameliorative measures giving the witness adequate protection against coercion. *Cf. Jones v. State,* 211 Ala. App. 505, 109 So. 564, 565. But when the Court lends its power to the coercive process, to whom can the witness turn?

Nor can it be presumed that the lesson was lost on other witnesses. After Beck testified, every witness (e.g., Stein, Bruder, Craig, Schwarte and others) knew the fate he would suffer if he did not give "satisfactory" testimony. And after hearing of what happened to Stein, Beck and Brown, certainly other witnesses were aware that they need not be particular with the truth—that it was only the prosecutor's satisfaction that they were called upon to meet.

III. The Community Was So Infested With Prejudice As to Make a Fair Trial Impossible.

It is admitted that the entire city was at a fever pitch of prejudice directed against this defendant—who had already been de facto convicted in the community mind of numerous murders. In this context, the prosecutor chose to take advantage of this pre-existing prejudice—brought to white heat immediately prior to trial by newspaper headlines accusing the petitioner of a brand new murder—bottoming his case upon the contention that

petitioner had brought wholesale murder to the city; and, inferentially, only conviction would end the wholesale slaughter.

The Fifth Amendment right to fair trial by a fair jury is incorporated within the Fourteenth Amendment and controlling here. The goal of that amendment is a "jury capable of taking in, free of prepossessions, evidence submitted in open court," and to avoid a trial when the "minds" of "fallible men and women—before they enter the jury box," are "saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." *Irvin v. Dowd*, 336 U. S. 717, 729, 730 (1948) (Frankfurter, J., concurring). When the community is permeated with a preconceived conviction of guilt, fairness is so difficult to attain "the court (does) not stop to consider the actual effect * * *, but (strikes down the conviction on the ground that prejudice (is) inherent * * *)," *Estes v. Texas*, 381 U. S. 532 (1965). The question is not whether there is a juror so biased that he acknowledges the fact. The question is, would it "*be difficult to say that each (juror) could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man*," *Irvin v. Dowd, supra*, at 727. See also *Delaney v. United States*, 199 F. 2d 107 (1952) (C. A. 1).

Publicity before and during the time of the trial creates problems apart from prejudice; jurors and witnesses have often reacted peculiarly when aware of the presence of an audience created by the mass media, *Estes v. Texas, supra*, Douglas, *The Public Trial and The Free Press*, 33 Rocky Mt. L. Rev. 1 (1960). The jury here was obviously aware of the audience. Their pictures ap-

peared in the paper, and rumors of jury tampering were reported in the press (13 Oct. 27—App. C, *infra*). As in *Sheppard** Petitioner was publicly accused by the police and the newpapers of the murders, and his denials reported in detail. But here, not only were these accusations made, and denials reported in the press; but the police were permitted to testify to them at length to the jury.**

Indeed this case goes beyond the cases noted in this section—even beyond such as *Chambers v. Florida, supra.* Here we find prejudice created not only by anger, passion and excitement, not only by a desire for retribution of a believed wrongdoer, but by a hysteria *created by fear—by a basic, elemental terror of death.* No juror in this case could escape the implication so carefully nurtured by the Prosecutor that he could be the next to feel the lead of Petitioner's guns.

IV. The Totality of Departures from Accepted Procedures Denied Petitioner a Fair Trial.†

The trial of this case so far departed from those minimal standards required under our system of justice as to constitute a plain violation of due process. The court permitted a great mass of inherently prejudicial but irrelevant evidence proving nothing—all of which should have been excluded. *United States v. Wortman*, 327 F. 2d 717 (1964); *Grunewald v. United States*, 353 U. S. 391 (1957); *Forman v. United States*, 259 F. 2d 128 (1958).

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* *Sheppard v. Maxwell*, 384 U. S. 333 (1966).

** Another parallel (noted in *Sheppard*)—while the trial was in process, the prosecutor and trial judge were successful candidates to succeed themselves, in office ("B," Nov. 7).

† This contention rests in no small part upon the positions already advanced: that testimony was wrung from witnesses by perjury arrests and that the spirit of prejudice so pervaded the community as to preclude a fair trial.

Perhaps any one of the irrelevancies alone constituted mere error not of constitutional proportions—and some though constitutional in dimension would be denied retrospectively when the age of this conviction is considered. But taken in sum, and considered in the totality of the deprivation to which Petitioner was subjected, due process is offended.

An unbelievable Quantum of the so-called testimony was not evidence at all; but rather the kind of dramatics commonly inserted by misguided authors in shabby moving picture and television courtroom scenes. The recital of policeman Timiney* from the witness stand that he had accused Licavoli of many murders, that Licavoli denied guilt; that he responsively argued to Licavoli that there had been no such murders prior to Licavoli's arrival on the scene was hardly evidence. Indeed, it does not even rise to the quality of hearsay. The highly inflammatory testimony of Mrs. Marks that her husband had been murdered and that sometime thereafter Licavoli had taken over the closed night club operated by the decedent without recompense was equally irrelevant. Licavoli was not charged with Marks' murder, and there was no reason to tell the jury that Marks had suffered a violent death. And certainly without probative value is the scene portrayed by Kennedy's bereaved mother when she recalled for the jury her fears for her son, and his castigation of Petitioner.

Moreover, as in *Sheppard,* a carnival atmosphere prevailed. One of the prosecutors handling the trial attacked no less a witness than the Sheriff of the county in the

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* Timiney's testimony may well be barred, and may constitute constitutional infringement under *Bram v. United States*, 168 U. S. 532 (1897), would be barred under *Miranda v. Arizona*, *supra*, but retrospectivity denied, *Johnson v. New Jersey*, 384 U. S. 719 (1966).

courtroom. Witnesses were arrested in and about the courtroom.*

A trial in which conviction is bottomed not on evidence, but upon speculation, accusation and vilification—all of which are permitted to be offered in evidence becomes a farce, an expression of community anger and fear, rather than a fact-finding process. While every error in the application of a rule of evidence does not result in constitutional infringement, a gross departure, as here, results in constitutional deprivation.

The court here owed Petitioner a trial on specific charges. Instead of that, the court permitted a trial in which Petitioner was convicted of standing guilty in the eyes of the community at large as being responsible for many many murders. The result offends our sense of fairness. It cannot stand. The "totality of all the circumstances" constitutes the fairest measure for determining whether vice has tainted the conviction. *Cf. Haynes v. Washington,* 373 U. S. 503, 515 (1963). This test was urged in *Miranda, supra,* 384 U. S. at 503 in his dissent by now-retired Justice Clark. It makes good sense, and should be adapted as a minimal standard.

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* The extensive comment of the prosecutor upon the failure of Licavoli to take the stand as demonstrated by *Griffin v. California,* 380 U. S. 609, has, of course, been held not retrospective in application. The inappropriateness of the wiretapping testimony offered is accentuated by the subject matter of the discussions intercepted. They are noted here only to demonstrate that the totality of the trial offends any reasonable concept of due process.

V. The Indictment Was Totally Defective in That It Charged a Conspiracy to Murder Which Is Not a Crime in Ohio—and Therefore Lacked the Requisite Specificity Required Under the United States Constitution.

Each count of the indictment charges the Petitioner as one of 13 persons who conspired to kill and murder and did kill and murder certain persons. There is no statute in the Law of the State of Ohio which makes conspiracy to kill and/or murder an indictable offense. *State v. Lucas* (C. P.), 54 O. L. A. 212, 39 O. O. 519; *State v. Hallos*, 76 O. A. 521, 32 O. O. 245. The Criminal Law of Ohio is entirely statutory, *Mitchell v. State*, 42 O. S. 383. Section 12380 of the General Code of Ohio effective at the time of indictment herein provided that an aider or abettor might be prosecuted and punished as a principal. (Now Revised Code 1.17.)

An aider and abettor is entirely to be distinguished from a conspirator. The two terms cannot be regarded as synonymous. *State v. Snell*, 2 O. N. P. 55 at p. 57, 5 O. D. 670, 672 (Common Pleas, 1898). Participation in the commission of an offense *is not shown by showing the accused to have been a member of a conspiracy but by showing the accused to have aided, abetted or procured another to have perpetrated a crime.* There must always exist a relation to the offense and the principal offender. It is aimless in Ohio law to speak of, or to prove, the conspiracy which is without legal significance in Ohio. In *Nye and Nissen v. United States*, 336 U. S. 613, 93 L. Ed. 919, at p. 925 (1948), the court made the distinction between *aiding and abetting* and *conspiracy* in a case in which both *aiding and abetting* and *conspiracy* were present.

An indictment which glosses over the difference between conspirator, and aider and abettor, *particularly one which settles upon and furnishes the basis for, prosecution*

for a crime which does not exist is void per se; it is void as a denial of due process in that it does not accord to the accused the federal constitutional right to enjoy in all criminal prosecutions the right to be informed of the nature and cause of the accusation, *cf. State v. Whitmore,* 126 O. S. 381; *DeBrul v. State,* 80 O. S. 52; *Greenland v. State,* 6 O. Dec. 313, 4 O. N. P. 122.

Failure to allege in the indictment one of three possible ultimate fact situations, viz., (1) that a named person was the principal, (2) that the Petitioner was one of the thirteen persons named in each of the counts, but that it was not known to the prosecution which one of said thirteen persons was the principal aided and abetted to commit the violent and criminal homicides, or (3) that the principal was unknown to the prosecution and could not be ascertained,—*constituted a failure to accord to the said defendant his fundamental Federal constitutional right to be informed of the nature and cause of the accusation.*

The failure to state one of the said three situations of fact required the impermissible assumption that because the homicides did in fact occur, they were as a fact produced by the alleged conspiracy,—albeit conspiracy is not a crime in Ohio.*

CONCLUSION.

For the reasons given, certiorari should be granted and Petitioner's conviction reversed.

Respectfully submitted,

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* In order to comply with the requirements of due process, an indictment must set forth the charge with specificity. *Fontana v. United States,* 262 Fed. 283 (1919); *United States v. Hess,* 124 U. S. 483, 488 (1888).

APPENDIX A.

OPINION OF THE COURT OF APPEALS, LUCAS COUNTY, OHIO.

MATTHEWS, J. This is a proceeding in error by Thomas Licavoli to a judgment of the court of common pleas of Lucas County rendered upon a verdict of a jury finding him guilty of murder in the first degree with a recommendation of mercy. We shall refer to Thomas Licavoli as the defendant hereafter. The indictment upon which he was tried contained four counts, each of which charges the murder of different persons. They differed only in dates and names of the persons slain. The first count is in this language:

> "The jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest Lasalle, Russell Syracuse, Ralph Corsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, each late of the County aforesaid, on the 6th day of October, in the year of our Lord One thousand nine hundred and thirty-one, at the County of Lucas aforesaid, did unlawfully, purposely and of deliberate and premeditated malice, conspire to kill and murder and did kill and murder one Abe Lubitsky, by shooting him, the said Abe Lubitsky, with a pistol, pursuant to the conspiracy theretofore entered into by and between the said Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest Lasalle, Russell Syracuse, Ralph Corsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

The second count charged the murder of Norman Blatt on the same day.

The third count charged the murder of Louise Bell on the 30th day of November, 1932.

The fourth count charged the murder of Jack Kennedy on the 7th day of July, 1933.

An indictment charging the commission of four separate and distinct offenses of murder in the first degree is unusual, and so far as we know without precedent, but it seems to be authorized by Section 13437-3, G. C. No objection to the indictment was made and, therefore, any such defect was waived (G. C. 13437-28) but the objection was made on motion for a new trial, and it is urged here that it does not charge the defendant with murder. It is claimed that the only charge is that of conspiracy to commit murder. There is,—as will be observed—an express allegation that the defendants conspired, which is unnecessary under the aider and abettor statute. (Section 12380, G. C.) However, there certainly can be no valid objection to expressly stating in an indictment an allegation of fact which is imported by implication of law. Had there been no such averment, the state of the trial would have been required to disclose then that it was not claimed that the defendant on trial had personally done the physical act of killing. Advising the defendant of that in the indictment was to his advantage and not to his prejudice.

It seems to us that the mere reading of the indictment is sufficient answer to the claim that it does not charge murder in the first degree. It does so charge in direct and explicit language.

In the voluminous briefs filed in this case many,—in fact most—of the rulings of the trial judge are assailed on one hand, and defended on the other. It would involve almost interminable repetition to pass upon each assign-

ment of error specifically. And it would serve no useful purpose. Some specific assignments will be noticed. Many of the errors claimed relate to the admissibility of statements made by defendants other than the one on trial. These assignments of error result from the divergent views of the trial judge and defense counsel as to the latitude of proof in cases of charges based on conspiracy, and as to whether there was proof that the defendant Licavoli was a party to a conspiracy as charged by the state. The validity of these assignments of error will be determined in large measure by a consideration of the evidence to ascertain whether the state has established its claim of conspiracy. The state at the outset of the trial, disclaiming any ability to prove that the defendant on trial was personally present at the killing of any of the victims, exerted its efforts to prove that the actual perpetrators were acting for or on his behalf, or that he was a member of a conspiracy to commit unlawful acts, involving resort to violence and threats of violence including the taking of human life if necessary to accomplish their unlawful purposes, or that the taking of human life was a natural consequence of the threats and violence contemplated.

The defendant Licavoli admitted that the murders had been committed, and the circumstances proven leave no doubt that the actual perpetrators committed them wilfully and with deliberate and premeditated malice.

The real issue, therefore, was as to whether the actual perpetrators were co-conspirators of the defendant, acting within and carrying out the purpose of the conspiracy. The taking of evidence on this subject consumed about three weeks and the verbal evidence occupies something over 1000 pages of the bill of exceptions. It has been necessary to read and analyze this record to reach a conclusion as to the sufficiency of the proof. The

chief contention of the defendant is that the evidence is so manifestly insufficient that the reviewing court can so declare from a reading of the record. We shall briefly state the conclusions reached from our consideration of this record.

The defendant did not take the witness stand and the only witnesses introduced on his behalf confined their testimony to impeachment of certain state witnesses. We are confined, therefore, to the state's witnesses for light on the actions of the defendants during the time under investigation.

The first glimpse of the defendant is revealed when he appeared in Toledo under the name of Tom Laxure in the spring of 1931. Shortly thereafter a dining and amusement place was opened at Point Place near Toledo. In addition to the ostensible lawful purpose, trafficking in intoxicating liquors and gambling were carried on at that place. From that point on, whenever and wherever the defendant appears in the evidence, we find him as an associate, at least, of his co-defendants and others, none of whom were engaged in any lawful occupation, but on the contrary were busy in circumventing or attempting to circumvent the law.

We see them conducting gambling places.

We find them importing intoxicating liquors and meeting the loaded trucks at the limits of the City of Toledo to accompany them to their destination within the City.

We discover them manufacturing or attempting to manufacture alcohol. In two instances they are engaged in constructing distilleries.

Somewhat later, perhaps, the evidence discloses them organizing or attempting to organize all the gamblers of a particular kind into some kind of an association.

Without invitation, they present themselves at a meeting of dry cleaners with the gratuitous suggestion that they are there to help "clean up" the industry followed by silence on the part of the dry cleaners, broken by one protesting voice, silence by a threat.

And finally the price for their services is disclosed when they proceeded to organize or "syndicate" the illegal liquor business. Overhead expense was to be kept down and prices raised and they (the organizers) were to receive forty percent of the profits.

Witnesses met the defendant face to face while he was actively engaged in some of these activities. He was an associate in many of these enterprises on the uncontradicted testimony of witnesses to his active participation. Many circumstances point to him as the leader of these outlaws. No sooner had he arrived in Toledo than we find him purchasing and paying for equipment for the Golden Rose where many, if not all, of his co-defendants were employed in conducting gambling and the illegal trafficking in liquor.

Upon the closing of the Golden Rose, the defendant actively directs the opening of the Show Boat and engaged in a similar business. In taking possession of this place at least one of the prior owners was silenced by intimidation.

Two carloads of sugar are purchased in the name of the General Importing Company and stored in the Terminal Warehouse. It was purchased for the defendant. He either owned the General Importing Company, or the purchase was made without the knowledge or consent of Petcoff,—the owner. But the evidence is that the defendant, when he purchased a piano on credit gave his business as "General Importing Co., 513 Monroe St.," and invitations to his wedding were found in its office desk. The sugar found its way to the distillery on Holmes

St., that was visited by the defendant several times during its construction.

We have the picture of the defendant in a room at the Argonne Hotel, which he equipped with a desk and a private telephone, calls over which did not go through the hotel exchange. Meetings are held; ten or twelve are there; he sits at the head of the table; the others listen as he talks in language other than English. He is referred to as the "boss" by the co-defendants who visited him, and he was heard to say to the men "You are being paid to do this."

On another occasion, the defendant told Officer Timiney that Sulkin and Rose, co-conspirators, were "nothing but messenger boys for me."

On another occasion, while engaged in unlawful acts, accompanied by intimidation and threats of violence, one of his co-defendants said that he was obeying the orders of his boss, meaning the defendant.

The defendant Licavoli and his co-defendants during the more than two years covered by the evidence assumed different names with, of course, the intent to conceal their identity.

To this should be added that the testimony shows that on numerous occasions the defendants are found in possession of fire-arms, including machine guns, and we have the description of a band of outlaws known to be engaged in many criminal acts including levying tribute upon others and equipped, and apparently determined, to go to whatever length necessary to overcome all opposition to their plan to obtain illegal gains. It is the description of a band engaged in what has become known as racketeering.

Independently of the statements of the co-conspirators made while pursuing the common design, we are of the

opinion that there is abundant evidence of the conspiracy existing between the defendant Licavoli and the others. The statements of these others while engaged in pursuing the unlawful purposes of the conspiracy are, therefore, admissible against each and all of the conspirators.

The purposes of the conspirators did not go unchallenged. Without specific reference to the incidents, it is sufficient to point out that whenever opposition arose some act of violence to either the property or the person of those opposed followed. There is the sound of the exploding bomb and the rattle of machine gun and pistol fire at many places in the record.

Opposition to their plans was the basis for each murder charged in the indictment.

Abe Lubitsky and Norman Blatt were killed at the same time. They were killed by shots fired from an automobile while they were seated in an automobile at a street intersection waiting for a traffic light to turn. Lubitsky was in the gambling business with Harris, who attended a meeting at which it was sought to organize the gamblers. He informed the police of something. Sulkin, a co-conspirator, had an argument with him. The circumstances lead to the belief that Sulkin knew or suspected that Lubitsky had informed on them. Blatt just before he died and immediately after the shooting said to his brother "It's the Dagoes." An automobile containing two of the conspirators (Lasalle and Carado) and an unidentified third person was traced by the evidence from a rendezvous of the conspirators to the scene and back so as to make their presence at the scene at the time probable. When the fatal shots are fired from an automobile and the occupants of the automobile are identified, the conclusion that they fired the shots is irresistible. Other circumstances pointed to them as the perpetrators.

Louise Bell undoubtedly met her death because she was in the company of Jack Kennedy by bullets intended for him. Jack Kennedy was engaged in the liquor business in violation of the law. He was a competitor and apparently was recognized as a fearless man. When Marea desired to be protected against the extortion of the defendants, he appealed to Kennedy for it. Likewise, when Wobser sought to disengage himself from the liquor syndicate, he sought the aid of Kennedy. It was Kennedy to whom Swaney appealed for help in repossessing the automobile he had sold on credit to defendant co-conspirators, on the request of the defendant. And finally, when he sought to recover the distilling machine that defendant and his associates had stolen, Kennedy was called and he with his associates forcibly took possession. He used force, threats and show of weapons against the defendants. A fight took place between Kennedy and Mirabella, a co-conspirator, on the street in front of a rendezvous of the conspirators and in the presence of several of them. As Kennedy left, many shots were fired, but he escaped unhurt.

Jack Kennedy and Louise Bell were in an automobile waiting for a traffic light to turn. Shots were fired from another automobile. Louise Bell was killed but Kennedy escaped. Rai and Moceri were identified as two of the three men in the automobile from which the shots were fired.

Later (July 7th, 1933) Kennedy was walking down a street in Point Place early in the night. He was accompanied by a woman. Two men stole up behind him and shot him several times, killing him instantly. These men were identified by several witnesses as Wop English and Mirabella. They were taken to the place by Syracuse, another conspirator, who stayed in the automobile in which they came. This automobile had a fictitious license number, constructed by combining parts of different genu-

ine license plates. On the afternoon of the day on which the murder was committed Moceri, Carsello, Lasalle and a man named Charlie, were seen in the defendant Licavoli's garage cutting license plates. Carsello, Lasalle and Moceri were seen in the vicinity at the time of the murder. The pistol that was used had been purchased by one of the conspirators from a pawnbroker. There are many corrobative incidents in the evidence.

We find it almost impossible to include many of the incidents of probative value in any summary without extending this recital unduly. The jury believed that these murders were committed by members of this conspiracy and that the defendant as a member and leader was criminally responsible to the same extent as though he were personally present and acting. In our opinion the evidence justifies the verdict.

As the conspiracy was established by the acts and declarations of the defendant himself, the declarations of his co-conspirators made during the pendency of the enterprise and in furtherance of the common object, became admissible against him. 17 *Ohio Juris.*, 328. This disposes of many of the objections to the evidence. We have examined the specific assignments of error in the admission of evidence. We are of the opinion that the evidence was competent in all instances, but in some instances its probative value was slight.

The photographs of the bodies of the slain were competent, notwithstanding there had already been a verbal description. The manner of causing the deaths had some value.

The state had the right to trace the actions of the co-conspirators even though it developed in so doing that some of them had been arrested.

The acts and behaviour generally of the conspirators during the conspiracy were competent even though such evidence reflected upon the character of the accused. That is frequently, and perhaps usually, the effect of the state's evidence in a criminal case.

The essence of the testimony of Sadie Gromintz was a scene between Jack Kennedy and Wop English, a co-conspirator, which tended to show that there was some ill-feeling existing and danger apprehended. This, we think, was clearly competent. The Court withdrew from the jury that part in which she expressed her own reaction to what was said and done.

Again, it is complained that witnesses were asked concerning conversations with defendant which only elicited denials of guilt on his part. What defendant said would be clearly competent against him. The State had the right to ask for the conversations. The fact that the answer elicited the statement that he denied guilt does not constitute error. It simply discloses that the inquiry was barren of probative results.

It is urged that the prosecutor interfered with defendant's right of cross-examination by developing upon direct examination that certain witnesses had made contradictory statements and had been reluctant to testify. While the procedure may be unusual, we know of no rule that requires the party calling a witness to present the testimony as unblemished, and thereby give his opponent the opportunity to expose the defects. It is the part of frankness to introduce the witness and his testimony just as it is in the first instance. It is customary to do that to a limited extent whenever a witness is placed on the stand.

Considering the testimony relating to the manner that the defendant and his associates took possession of the

Show Boat in which Mrs. Marks had an interest, we cannot say a priori that the fact that her husband had met a violent death shortly before that was an improper subject of inquiry of her as a witness. The fact that it was not followed up by evidence circumstantial or direct connecting the defendants with the killing would have the effect only of rendering it of no probative value.

It is claimed that many acts of misconduct were committed by the prosecuting attorney and his assistants. In the examination of witnesses some leading questions were asked. From the record, we can see that in many instances they were necessary because of the attitude of the witness. In other instances, it is not so clear, but the latitude of the examination in this manner rests largely in the discretion of the trial court, and we cannot say the court abused that discretion.

We have read the arguments of counsel, and it is our opinion that in view of the very full statement in the charge of the court on the purpose of arguments to the jury, no prejudicial conduct appears.

It seems to us that the charge of the court covered all phases of the case presented by the indictment and the evidence very carefully and correctly. Counsel urges two errors in that respect. The first is that the court failed to charge on the included offenses, and erred in overruling counsel's request that he do so. That murder in the first degree was committed by the actual slayers, there can be no manner of doubt. The issue was whether the defendant on trial bore such a relation to the actual slayers as would make him legally answerable for their acts. The indictment charged murder in the first degree. The evidence presented no alternative. It was either that or acquittal. Under such circumstances, there was no issue before the jury to which a charge of murder in the second

degree or manslaughter would have been applicable. A charge thereon would have been inappropriate. *Bandy vs. State,* 102 Ohio St., 384; *State vs. Champion,* 109 Ohio St., 281; *Glasscock vs. State,* 125 Ohio St., 75.

As to the request made at the close of the charge to charge further that:

> "If the killing be done by some persons or person other than defendant for reasons or motives peculiar to themselves alone, independent of any concert with or aiding or abetting by defendant, then the defendant must be found not guilty,"

it is sufficient to say that the charge already given fully covered the law relating to responsibility for the acts of co-conspirators. That being the situation, no error was committed by refusing to charge further. *Romer vs. State,* 39 Ohio App., 309; *Bond vs. State,* 23 Ohio St., 349; *Stewart vs. State,* 1 Ohio St., 66. Furthermore, we are not convinced that the request contains a correct statement of the law. The reasons or motives of the slayers might have been peculiar to themselves alone and those reasons or motives might have been entirely independent of any concert of the defendants therein in any way, and still, it seems to us, that the act might have been in furtherance of the purposes of the common design. The slayers might have developed in the execution of the conspiracy personal reasons or motives for killing to further the end intended by the conspirators.

The jury interrupted its deliberations to submit this question to the court:

> "Does a man found guilty of murder in the first degree with mercy recommended by the jury, serve a whole life in the penitentiary, or is he eligible for parole?"

In answer, the Court instructed the jury that:

"I direct your attention to Section 12399 of the General Code of Ohio:

'Murder in the first degree, as defined in this chapter shall continue to be a capital offense within the meaning of the constitution and no person convicted thereof shall be recommended for pardon by the board of pardons or for parole by the board of managers of the penitentiary, except upon proof of innocence established beyond a reasonable doubt.'

The provision of this section that no person convicted of murder in the first degree shall be recommended for pardon or parole except upon proof of innocence established beyond a reasonable doubt, is not an invasion of the Governor's Constitutional power to pardon, and the **Governor could pardon if so disposed at any time.** This question, however, is not an issue of the case and it is not a thing for the jury to speculate upon. You may retire."

It is conceded that *Liska vs. State,* 115 Ohio St., 284, is authority for the correctness of this charge, unless a subsequent change in the statutes has destroyed that authority. It is claimed that the repeal of Sec. 93, G. C., has that effect. That section was:

"Notwithstanding the action of the state board of pardons, the governor may grant or reject an application for pardon, commutation of sentence, or reprieve, if in his judgment the public interests would be promoted thereby."

The pardoning power is conferred upon the Governor by the Constitution. By Section 11 of Article III, it is provided:

"He shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes

and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason he may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon or reprieve, with his reasons therefor."

It is claimed that the language, "subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law," authorizes the legislature to limit the power conferred upon the Governor by regulating the procedure. We do not so construe that language. If so construed, it would or could nullify the power of the Governor. It must be assumed that the Governor, as well as every other public officer, charged with the duty of deciding, will act judiciously. Section 11 of Article III of the Constitution, by requiring the Governor to report his reasons to the General Assembly, is a recognition to hear and reach an honest conclusion, at least, before granting a pardon. Granting a pardon without doing so would be just ground for impeachment. The power of the legislature to regulate the manner of applying for pardons is limited to such regulations as will assist the Governor in the discharge of his duty to act judiciously. Such regulations would not limit the proper exercise of the pardoning power *at any time*.

The only statutes that are claimed to limit the power of the Governor are Sections 2211-4 to 2211-8, G. C., in-

clusive, and particularly the last named section. By the first section the power of the Governor is specifically excepted. And the other sections deal with the powers, duties, and procedure of and before the Board of Parole. The fact that the Governor is given power by Section 2211-8, G. C., to modify the time of hearing before the board does not, in our opinion, import a limitation upon his power to pardon. Only by a strained construction could it be held that the legislature intended by either the repeal of Section 93, G. C., or by the language of Sections 2211-4 to 2211-8, G. C., or by both, to attempt a limitation of the time when the pardoning power could be exercised. In relation to the Governor's pardoning power, the duties of the Board of Parole are advisory only. At the time *Liska vs. State, supra,* was decided, the statutes required all applications for clemency to be filed with the Board of Clemency (Sec. 92-2, G. C., in force at the time), and the same reasoning that would make the present statutes a limitation upon the Governor's power to pardon *at any time* was equally applicable then.

We find no error in the action of the trial court in instructing the jury on the effect of a recommendation of mercy.

We have attempted to disclose the essential reasons for our affirmance of this judgment of conviction, and have discussed specifically the most serious claims of error. In a trial of the duration of this one, it would be surprising if technical error was not committed, but that is not sufficient to justify a reversal. We are prohibited by the express terms of Sec. 13449-5, G. C., from reversing a conviction for any error unless "it affirmatively appears on the record that the accused was or may have been prejudiced thereby." We have been impressed by the desire of the trial judge to safeguard the rights of the accused

The charge was full and fair, repeating many times the duty of the state to convince the jury beyond a reasonable doubt, and that the jury should not convict unless so convinced, and admonishing them to be guided solely by the evidence in reaching a conclusion without bias or prejudice.

The defendant did not either personally or through witnesses offer any explanation of the facts and incidents connecting him with these murders. It seems to us that the natural conclusion to be drawn from the evidence is that defendant was a conspirator and that these murders were committed by co-conspirators while pursuing the objects of the conspiracy in the manner contemplated by all of them. No other conclusion can be drawn. The only alternative is presented not by the evidence but in the argument of defendant's counsel and accompanied by counsel's statement that he did not believe the alternative which he presented.

Finding no error prejudicial to the plaintiff in error, the judgment of the court of common pleas is affirmed.

Ross and HAMILTON, *JJ.*, concur.

APPENDIX B.

JUDGMENT OF THE SUPREME COURT OF THE STATE OF OHIO.

1967 TERM

To wit: April 26, 1967.

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX C.

APPENDIX OF NEWSPAPER HEADLINES.

"Licavoli, Thirteen Others, Indicted in Slaying. (MH-C, March 8, 1934)*

Secrets of Licavoli Gang Reported Told. (MH-C, March 9, 1934)

Licavoli Death Trial Set to Begin October 9 (September 5, 1934)

Jimmy Hayes Found Slain in Detroit Area; Revenge Murder Blamed on Gang (MH-C, October 4, 1934) (A sub headline reads: 'Licavoli Mob Blamed')

Hayes Murder Suspect Seized (MH-C, October 5, 1934) (A sub headline reads, in part: 'Licavoli Gang Linked to Killing')

Licavoli Trial Counsel Asks For Fair Play (Second section, front page, October 5, 1934)

Alibi Defense To Be Offered For Licavoli (October 8, 1934)

Licavoli Jury Will Not Be Locked Up (C, October 9, 1934)

New Witness Discovered in Licavoli Case (October 10, 1934)

Licavoli Jury is Completed (C, October 12, 1934)

Licavoli Witnesses Missing, Trial is Continued a Week (MH-C, October 15, 1934)

Licavoli Death Penalty Asked (MH-C, October 22, 1934)

Maid Bares Licavoli Conferences in Hotel Room Here (MH-C, October 24, 1934)

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* MH = main headline page one; C = story continued on another page.

Licavoli Witness Jailed for Perjury (October 25, 1934) (Sub headline: 'Defense Counsel Reprimanded by Judge for Seating Deputy Next to Defendant') (This story should be considered in conjunction with the claim that witnesses were intimidated by the prosecution. The beginning of this story reads as follows:

> 'Arrest of a reluctant state witness on the charge of perjury was made on the orders of Frazier Reams, County Prosecutor today,' (MH-C)

Firetop's Phone Calls Disclosed (MH-C, October 26, 1945) (Sub headline: 'Defendant Recites Conversations Heard By Tapping Wires of Licavoli Henchmen')

Detective Describes Raid on Licavoli Home (October 26, 1934, P. 12) (This story tells of police seizure of 15 cases of gin and champagne during the honeymoon of Mr. Licavoli and his bride)

Licavoli Gang Trial Tampering Report Denied By Judge (Sub headline: 'Reams Will Probe Mysterious Phone Call Hinting at Attempt to Hang Murder Jury') (MH-C, October 27, 1934)

Louise Bell Murder To Be Described By Only Eye Witness (MH-C, October 29, 1934)

Licavoli Witness Arrest Ordered (MH-C, October 30, 1934) (On the same date the following headline also appeared on Page 1 of the Toledo Blade: 'Charities To Benefit by Jimmy Hayes Will')

Widow Relates Club Pirating (MH-C, October 31, 1934) (Sub headline: 'Mrs. Marks Tells of Licavoli Deal'; 'Yonnie Muscled In On Show Boat After Her Husband's Murder, Witness Testifies')

English Mirabella Named Triggerman in Kennedy Murder (MH-C, November 1, 1934) (Sub headline: 'Craig

and Schwaite Tell Story of Gang Killing. Special Witness Awaited')

Woman Tells Murder Story; State Rests Case Against Gangster (MH-C, November 2, 1934)

Licavoli Ex-Gardner Arrested For Perjury (P. 12, November 2, 1934) (This story tells of the arrest of the man above under the order of Frazier Reams)

Brown Faces New Grilling In Gang Trial (Sub headline: 'Racketeer's Gardner May Be Called to Stand Before Prosecution is Closed'; 'State Expected to Rest Monday'; 'Secrecy Veils Plans of Defense to Combat Accusations Against Racket Chief' (MH-C, November 3, 1934)

Krieger, Rhinefort Have Fist Fight In Judge's Chambers. (Sub headline: 'Sheriff and Assistant Prosecutor Battle After Licavoli Testimony Leads to Hot Words'. (MH-C, November 5, 1934)

Licavoli Trial To Reach Jury This Week (C, November 6, 1934)

Chair Demanded For Licavoli (C, November 7, 1934) (This was the day after election day and the front page announced the re-election of Frazier Reams and Judge McCabe)

Jury May Be Locked Up To Deliberate on Licavoli's Fate (MH-C, November 8, 1934)

Licavoli Sentenced to Life in Prison (MH, November 9, 1934)."

APPENDIX D.

INDICTMENT.

COUNT 1.

The jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oath, in the name and by the authority of the State of Ohio, do find and present that Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, each late of the County aforesaid, on the 6th day of October in the year of our Lord one thousand nine hundred and thirty-one, at the County of Lucas aforesaid, did unlawfully, purposely, and of deliberate and premeditated malice, conspire to kill and murder and did kill and murder one Abe Lubitsky, by shooting him, the said Abe Lubitsky, with a pistol, pursuant to the conspiracy theretofore entered into by and between the said Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

COUNT 2.

The jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oath, in the name and by the authority of the State of Ohio, do find and present that Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and

Sebastian Lupica, each late of the County aforesaid, on the 6th day of October in the year of our Lord one thousand nine hundred and thirty-one, at the County of Lucas aforesaid, did unlawfully, purposely, and of deliberate and premeditated malice, conspire to kill and murder one Abe Lubitsky and did kill and murder one Norman Blatt, by shooting him, the said Norman Blatt, with a pistol, pursuant to the conspiracy theretofore entered into by and between the said Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

COUNT 3.

The jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oath, in the name and by the authority of the State of Ohio, do find and present that Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, each late of the County aforesaid, on the 30th day of November, in the year of our Lord one thousand nine hundred and thirty-two, at the County of Lucas aforesaid, did unlawfully, purposely, and of deliberate and premeditated malice, conspire to kill and murder one Jack Kennedy, and did kill and murder one Louise Bell, by shooting her, the said Louise Bell, with a pistol, pursuant to the conspiracy theretofore entered into by and between the said Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell

Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

COUNT 4.

The jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oath, in the name and by the authority of the State of Ohio, do find and present that Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, each late of the County aforesaid, on the 7th day of July, in the year of our Lord one thousand nine hundred and thirty-three, at the County of Lucas aforesaid, did unlawfully, purposely, and of deliberate and premeditated malice, conspire to kill and murder one Jack Kennedy, and did kill and murder one Jack Kennedy, by shooting him, the said Jack Kennedy, with a pistol, pursuant to the conspiracy theretofore entered into by and between the said Joe Wop English, Leo Moceri, Thomas Licavoli, John Mirabella, Jacob Sulkin, Ernest LaSalle, Russell Syracuse, Ralph Carsello, Harry Leonard, James Licavoli, John Rai, Anthony Besase and Sebastian Lupica, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

APPENDIX E.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment V:

"No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; * * *."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV:

"No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

"Section 12400, Ohio, G. C. Murder in the first degree. Whoever, purposely, and either of deliberate and premeditated malice, or by means of poison or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life (R. S. 6808)." (now Sec. 2801.01 R. C.)

Ohio Revised Code, Sec. 1.17 (formerly 12380, Ohio G. C.):

"Any person who aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender."

Section 2953.21, Ohio Revised Code:

"A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

"Unless the petition and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto.

"If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, it shall vacate and set aside the judgment, and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate."